



## Tilburg University

### Cicero and Ulpian

Tellegen-Couperus, O.E.

*Published in:*

Revue Internationale des Droits de l'Antiquité

*Publication date:*

2009

*Document Version*

Early version, also known as pre-print

[Link to publication in Tilburg University Research Portal](#)

*Citation for published version (APA):*

Tellegen-Couperus, O. E. (2009). Cicero and Ulpian: Two paragons of legal practice. *Revue Internationale des Droits de l'Antiquité*, 56(1), 12.

#### General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

#### Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

## Cicero and Ulpian, Two Paragons of Legal Practice

Olga Tellegen-Couperus (Tilburg)

### 1. Introduction

Justinian's Digest are generally regarded as containing the bulk of classical Roman legal science. However, legal science presupposes the existence of a system of norms, including theories of the legal concepts of which the system is made up.<sup>1</sup> This system is supposed to provide the means of solving legal problems by deductive reasoning, that is, by using logic. However, in the Roman sources, there is no such system and little deductive reasoning. The argument that Roman law is case law and, therefore, different does not hold because, in a case-law system too, there must be a context of justification. The form of legal reasoning that is most commonly found in the Roman sources is that based on induction. Reasoning by analogy, for instance, seems to have been rather popular. However, analogy is based on similarities and probabilities, not on logic. It is a dubious but practical way of solving legal problems. The question, therefore, is whether it is right to qualify the Digest texts as belonging to legal science, to legal theory. In this paper, I do not want to discuss the more general question whether law is a science<sup>2</sup>, but I do want to suggest that Roman law as laid down in the Digest was not the result of legal theory but of legal practice.

Cicero's forensic orations are generally considered the example *par excellence* of legal practice. They are usually referred to as non-legal sources and are regarded as valuable but not quite reliable because, intentionally or unintentionally, Cicero sometimes neglects or even distorts essential data of Roman law in order to defend his client's interests.<sup>3</sup> Moreover, Cicero's extant speeches deal with a random range of topics. In my view, however, Cicero's pleas have more to offer than information on legal rules. They also show how he went to work in building his case, what reasoning he applied. That kind

---

<sup>1</sup> Thus, for instance, F. Horak, *Rationes decidendi* I, Aalen 1969, 23-44.

<sup>2</sup> The question of law being a science is hotly debated. See J. Schröder, *Recht als Wissenschaft. Geschichte der juristischen Methode vom Humanismus bis zur Historischen Schule (1500-1850)*, Munich 2001. For the Netherlands, see, for instance, C.H. van Rhee, *Geen rechtsgeleerdheid, maar wel rechtswetenschap!*, *Rechtsgeleerd Magazijn Themis* 2004, 196-201.

<sup>3</sup> Thus, for instance, M. Kaser, *Das römische Privatrecht*, 2<sup>nd</sup> edition, Munich 1971, 189.

of information may help to understand how law in practice worked, and may even clarify the relationship between the Roman jurists and legal practice.

In this paper, I want to compare Cicero's way of reasoning with that of one of the classical jurists, Ulpian. The majority of their texts as included in Justinian's Digest deal with private law, so it seems appropriate to turn to the four pleas of Cicero that do so too. Two of them address the same legal device, namely the *interdictum de vi armata*.<sup>4</sup> It is therefore interesting to see how they compare to the Digest texts in the Title D. 43.16 *De vi et de vi armata*. This title contains twenty texts, most of which were taken from Ulpian's commentary *ad edictum*. For Cicero, I will focus on his oration *Pro Caecina*. Is his way of reasoning basically different from that used by Ulpian? If so, then I must conclude that jurists and advocates worked in different realms of the law. If not, it will be possible to conclude that both Cicero and Ulpian wrote for legal practice.

I will begin by summarily describing the *Pro Caecina* case and the question that was to be decided in the lawsuit (section 2). Secondly, I will – also summarily – discuss the text of the two interdicts *de vi* and *de vi armata* on which the trial turned (section 3). As the two advocates – Cicero and Piso – interpreted the interdicts in different ways, I will summarize their pleas (section 4), and then compare their interpretations with Ulpian's commentary (sections 5 and 6).

## **2. The case of Cicero's plea for Caecina**

The dispute in which Cicero acted as advocate for Caecina concerned the property of a piece of land in Etruria. It had once belonged to a Marcus Fulcinius, a banker from Rome. He had been married to Caesennia, who, like him, hailed from the town of Tarquinii. They had one son, also called M. Fulcinius. The dispute in question arose from their three wills.

- (a) Fulcinius had made a will in which he instituted his son as his heir and in which he left a usufruct over all his property to his wife Caesennia so that she would

---

<sup>4</sup> The other two deal with the contract of *societas* (*Pro Quinctio*) and the *contractus litteris* (*Pro Roscio Comoedo*).

enjoy it along with their son Marcus. This property included a country estate, the Fulcinian farm. Fulcinius senior died.

- (b) Marcus Fulcinius, the son, made a will in his turn in which he instituted P. Caesennius as his heir and left a large sum of money to his wife; he also bequeathed the largest part of his property to his mother, Caesennia. Marcus Fulcinius junior died too. His property was auctioned so that the proceeds could be divided up. At the auction, Aebutius, a business relation of Caesennia's, bought the Fulcinian farm. Cicero claimed that Aebutius was acting on behalf of Caesennia, but he could not prove it. Moreover, there was no evidence that Aebutius had also transferred this farm to Caesennia. Aebutius maintained that he had bought it for himself.
- (c) In the meantime, Caesennia remarried. She then made a will in which she instituted her second husband, Aulus Caecina, as her heir for 23/24<sup>th</sup>; Marcus Caesennius, a freedman of her first husband, for 1/36<sup>th</sup>; and Aebutius for 1/72<sup>nd</sup>.
- In due course, Caesennia died too.

The conflict that then arose between Caecina and Aebutius concerned the Fulcinian farm: Caecina claimed that it was part of the inheritance under Caesennia's will, but Aebutius asserted that he had bought it for himself, not for Caesennia. Because Caesennia's account books were missing and because there was no public registration of changes in the ownership of land, neither party could prove their point. They decided to take the matter to court.

In preparing the trial, they were to use a procedure of which we know practically nothing, the *vis ac deductio moribus*: it implied that Aebutius would formally expel Caecina from the Fulcinian farm, after which the judge would decide who had the better title to the property.<sup>5</sup> However, things took a different turn. When, on the appointed day, Caecina together with some friends approached the farm, they were met by Aebutius and a large band of armed men who barred their way and prevented them from entering. Caecina decided to avoid a conflict and returned to Rome. He obtained from the urban praetor an *interdictum de vi armata* against Aebutius. In the trial that followed, Cicero

---

<sup>5</sup> On this much debated procedure, see J. Platschek, Überlegungen zur "vis ac deductio", in *Studii in onore di Luigi Labruna*, Naples 2007, VI 4395-4422, and id., Bemerkungen zur Ciceros Rede für Caecina, in *Antike-Recht-Geschichte, Symposion zur Ehren von Peter E. Pieler*, both forthcoming, with literature.

appeared on behalf of Caecina and C. Calpurnius Piso defended Aebutius. The trial was adjourned twice and at the third and final session Cicero delivered the speech that has come down to us. The central question was: could Aebutius' act of preventing Caecina from entering be interpreted as driving out in the sense of the interdict?

### 3. The interdicts *de vi* and *de vi armata*

The political instability of the early 1<sup>st</sup> century BC caused a rising use of armed violence, not only in Rome but also in the countryside. The common people were terrorized, particularly by gangs of slaves (*familiae*). The existing procedure to protect possession against the use of violence, the *interdictum de vi*, did not offer sufficient help. In 76 BC, the praetor *peregrinus* introduced a new device to curb this form of violence by allowing a *iudicium* against the owners of such gangs. The urban praetor probably included this action known as the *interdictum de vi armata* almost at once into his edict too.<sup>6</sup>

The trial between Aebutius and Caecina took place in 69 BC, on the basis of the *interdictum de vi armata*. In the advocates' speeches, both interdicts are compared and interpreted, so it is necessary to begin by quoting their texts as they have been reconstructed by Lenel.<sup>7</sup>

Interdict *de vi* (on force)

*Unde tu aut familia aut procurator tuus illum aut familiam aut procuratorem illius in hoc anno vi deiecisti, cum ille possideret, quod nec vi nec clam nec precario a te possideret, <eo restituas>.*

Whence you or your slaves or your agent have within this year driven out by force this man or his slaves or his agent, at a time when he possessed what he possessed neither by force nor by stealth nor on grant from you, thereto shall you restore him.

Interdict *de vi armata* (on armed force)

*Unde tu aut familia aut procurator tuus illum aut familiam aut procuratorem illius vi hominibus coactis armatisve deiecisti eo restituas.*

Whence you or your slaves or your agent have driven out this man or his slaves or his agent by force with men assembled or armed, thereto shall you restore him.

---

<sup>6</sup> For a historic overview of these two interdicts, see B.W. Frier, *The Rise of the Roman Jurists*, Princeton 1985, 52-57.

<sup>7</sup> Reconstruction by O. Lenel, *Das edictum perpetuum. Ein Versuch zu seiner Wiederherstellung*, 3<sup>rd</sup> edition, Leipzig 1927 (reprint Aalen 1956 and 1974), 462 and 467.

Both interdicts were granted against persons who through violence, secrecy, or *precarium* (with revocable permission of the rightful possessor) had taken possession of land belonging to someone else and now refused to hand it over to that person. The first interdict deals with ‘regular’ violence: it allowed the ejector to defend himself by claiming lawful possession. If he could prove that the plaintiff himself had acquired possession in an unlawful manner, then the plaintiff’s claim would be denied and the ejector would not have to restore possession to the plaintiff. The interdict on armed violence, however, does not allow any defence. The fact that he had used armed violence weakened the defendant’s position in the trial.

#### 4. The pleas of Piso and Cicero

In the trial of Caecina vs Aebutius, Cicero had to prove that Aebutius and his supporters had taken up arms against Caecina and his friends and had prevented them from entering the Fulcinian farm, thereby acting contrary to the interdict *de vi armata*. Piso on the other hand had to deny that the interdict was applicable. Because Piso as advocate for the defendant determined the status of the conflict, I will begin by summarizing his plea.<sup>8</sup>

It was clear that the facts of the case could not be denied, so Piso had to resort to interpreting the interdict. In terms of classical rhetoric, he opted for one of the *status legalis*, and particularly for the interpretation according to *verba/voluntas*. From Cicero’s speech, it can be deduced that Piso put forward two arguments. First, he focused on the verb *deicere* as used in the interdict: there is only ‘driving out’ (*deicere*) when the ousted person was driven out of some place. Caecina had not been driven out of the Fulcinian farm but had only been prevented from entering, so according to the letter the interdict did not apply. Second, he argued that the interdict was only applicable if the expelled person had had possession, even though it did not say so explicitly. Caecina had never

---

<sup>8</sup> I base my reconstruction on J.W. Tellegen, Savigny’s System and Cicero’s Pro Caecina, in *Orbis Iuris Romani* II 1996, 91-106. For a detailed analysis of the argumentation, see L. Fotheringham, Repetition and Unity in a Civil Law Speech: The Pro Caecina, in J. Powell and J. Paterson (eds), *Cicero the Advocate*, Oxford 2004, 253-276.

had possession of the Fulcinian farm; indeed, as a citizen of Volaterra he could not even inherit from a Roman citizen, so for this reason too the interdict was not applicable.<sup>9</sup>

There was very little Cicero could say against Piso's second argument, because he could not prove that Caecina had had possession of the Fulcinian farm. Of course, as usufructuaries, Caesennia and her son had had a kind of possession of the farm, but whether she had really bought it at the auction after his death depended on circumstantial evidence. Cicero therefore focused on Piso's first argument, the meaning of *deicere*.

Cicero arranged his plea as follows. After a long *exordium* (1-9) and an even longer *narratio* (10-23), he put forward his first argument, in which he gave a detailed description of Aebutius using armed violence against Caecina and in which he claimed that the intention of the interdict was to protect citizens against the use or threat of the use of armed force (24-64). In an intermezzo, Cicero ridiculed Piso's literal interpretation of *deicere*, sang the praises of Roman law, and stressed the importance of legal security for citizens (65-85). Then, in the second argument, he compared the words of the interdict *de vi armata* with those of the interdict *de vi* and concluded that, for the latter, possession is a condition, but for the former it is not (86-93). This interpretation was true from both a literal and an intentional perspective on the interdict: when the forefathers had formulated the interdict on armed force, they had wanted it to apply in all cases of armed force being used. He concluded with an argument *extra causam* claiming that Caecina had indeed had possession (94-95) and that, as a citizen of Volaterra, he had been able to acquire Caesennia's inheritance (95-102). A short peroration concludes the plea (103-104).

For the purpose of this paper, Cicero's arguments to support his first contention are particularly relevant. He first dwelt on the armed violence used by Aebutius and his supporters but also anticipated on the central question of the trial, namely the meaning of the word *deiecisti* in the interdict *de vi armata* (37). Then, he brilliantly showed that life would be impossible if the texts of laws, senatorial decrees, contracts, wills, etc., were to be taken literally (51-54). He concluded by discussing word for word the *formula* of the

---

<sup>9</sup> In Romanist literature (Savigny, Nicosia, Stroh), it is assumed that Piso first argued that Caecina could not use the interdict because he was not a possessor, and then stated that there was no expulsion but only prevention of entry. However, it seems more likely that his first defence was based on the wording of the interdict, particularly on the word *deiecisti*.

interdict *de vi armata*, showing that the relevant words should not be taken literally (55-64).

- The word 'familia' means 'household', but the interdict is also applicable if only one single slave has expelled by armed force (55).
- The word 'procurator' stands for agent, but is also used for one's tenant, or neighbour, or client, or freedman, or anyone else who acted at your request or in your name (57-58).
- The words 'hominibus coactis' refer to men assembled, but also to men who are not assembled but who came together of their own accord or who even did not assemble but just habitually frequented the place before the occurrence for the purpose not of using force but of tillage and pasturage (59), even to unarmed men (64).
- The word 'armatisve' (or armed men) is generally used for men who are provided with swords and spears, but can also be used for those who throw sticks and stones, and clods and turf (60),
- Finally, Cicero quotes Aebutius' answer to the interdict: 'non deieci, non enim sivi accedere': 'I did not drive him out of the farm for I never let him reach it' and states that he would be at a loss if he had to maintain that a man who has been put to rout and to flight is not driven out (64). Something so self-evident does not need any further comment.

We do not know who won this trial: Caecina or Aebutius. However, it is possible to check whether the points of view maintained by both parties have been inserted in the juridical literature. The most likely source to check is title D. 43.16 that is dedicated to the interdicts *de vi* and *de vi armata*.

## **5. The interdicts *de vi* and *de vi armata* in the Digest**

Most of the twenty texts in D.43.16 *De vi et de vi armata* stem from the late classical jurist Ulpian. In book 69 of his commentary on the Edict, Ulpian deals with the interdicts *de vi quotidiana* and *de vi armata*, and with two special cases in which the interdict was



applied.<sup>10</sup> First, Ulpian quotes the interdict *de vi*<sup>11</sup> and then, in the following 48 sections, he discusses the interpretation of the relevant words. Then, ten texts on the interdict *de vi armata* follow. The compilers of the Digest included the first group in D. 43.16.1 and the second one in D.43.16.3, with a text of the jurist Paul in between.

In D. 43.16.1, Ulpian mentions two topics that were also at stake in the trial between Caecina and Aebutius. The first one is the word *familia*, in D. 43.16.16 and 17:

(16) *Familiae autem appellatio servos continet: (17) Sed quaeritur, quem numerum servorum contineat, utrum plurium an vero et duum vel trium. Sed verius est in his interdicto, etiamsi unus servus vi deiecerit, familiam videri deiecisse.*  
(16) The term *familia* includes slaves; (17) but what number of slaves does it include? Two or three or more? The better opinion is that under this interdict, even if one slave has driven out by force, the *familia* is held to have driven out.

Like Cicero, Ulpian interprets the word *familia* in the interdict as meaning any number of slaves, even one. Not surprisingly, the argumentation is missing, whereas Cicero referred to the principles of law, the force of the interdict, the purpose of the praetors, the design and intention of wise men (*hominum prudentium*=jurists?) as well as to the Latin language to support his claim that the word *familia* should be interpreted according to the purpose of the interdict.

The second topic is the question whether the interdict *de vi* is applicable only when the ejected person had had possession. Ulpian dealt with it in D. 43.16.1.23:

(23) *Interdictum autem hoc nulli competit nisi ei, qui tunc cum deiceretur possidebat, nec alius deici visus est quam qui possidet.*  
(23) This interdict lies in favour of no one but the person who was in possession at the time he was driven out, and no one is held to be driven out except the person in possession.

According to Ulpian, there is no doubt: possession is required. The same point of view was defended by Piso in his second argument against Cicero. This defence was quoted by Cicero (90): ‘illa defensio, eum deici posse qui tum possideat: qui non possideat nullo modo posse’ (this defence that a man can be driven out if in possession at the time, but cannot possibly be so if not in possession). Ulpian’s words seem to suggest that, on this

---

<sup>10</sup> O. Lenel, *Palingenesia iuris romani*, Leipzig 1889 (rpt. Graz 1960), 814-819.

<sup>11</sup> In Justinian’s time, the two interdicts were merged and the defence of unlawful possession had been abolished. Therefore, the wording of the interdict *de vi* in the Digest differs considerably from that as reconstructed by Lenel for classical Roman law (see above, note 6).

point, Piso was put in the right.<sup>12</sup> However, they do not necessarily so. In his second argument, Cicero did not deny that possession was required for the interdict *de vi*, but he only argued that it was not required for the interdict *de vi armata*. He based this argument on the fact that the interdict on force contains the following two phrases: 'cum ille possideret' and 'quod nec vi nec clam nec precario possideret', and that they miss from the interdict on armed force. Ulpian does not mention this difference in his commentary on the edict, at least not in the version that is included in the Digest. However, the compilers of the Digest removed the defence of unlawful possession from the interdict *de vi*, and it is likely that, if Ulpian would have mentioned this defence in his commentary on the interdict *de vi armata*, they would have removed that as well. Therefore, it is not possible to conclude who was put in the right on this point.

D. 43.16.3 contains part of Ulpian's commentary on the interdict *de vi armata*. Here also he includes a number of topics that were dealt with in the Caecina-Aebutius trial. First, Ulpian comments on the words 'armis deiectum'. In D.43.16.3.2-3 he states:

*(2) Armis deiectum, quomodo accipimus? Arma sunt omnia tela, hoc est et fustes et lapides, non solum gladii hastae frameae, id est romphaeae. (3) Plane et si unus vel alter fustem vel gladium tenuit, armis deiectus possessor videtur. (4) Plus dicitur, et si inermes venerant, si in ipsa concertatione qui inermes venerant eo processerunt, ut fustes aut lapides sumerent, vis erit armata.*

(2) How do we define driving out by arms? Arms are all weapons, that is, not only swords, spears, and lances, but also sticks and stones. (3) Plainly if one or another held a stick or sword, the possessor is considered to have been driven out by arms. (4) One must go further and say that even if they came unarmed, but got to the point of taking up sticks and stones, it will be armed force.

In *Pro Caecina* 60-61, Cicero had given a similar interpretation of the word 'armatisve': those who are provided with shields and spears as well as those who use clods, or sticks, or stones. He suggested that Piso would 'doubtless establish your [his] point that those who threw stones picked up from the ground were not armed men'. However, in a trial over the word 'arms' those points can be put forward but in a trial over law and equity no judge will accept the term 'an armed man' only in the sense suitable to a military arms-inspection.

---

<sup>12</sup> Earlier, I thought so too, cf. Tellegen-Couperus 1991, 45

Next, Ulpian describes a number of cases where fear of weapons being used drove people out: in some cases that was enough for them to be regarded as driven out by arms.<sup>13</sup> He concludes this passage with a situation in which someone has been prevented entry by armed violence:

(8) *Si autem, cum dominus veniret in possessionem, armati cum prohibuerunt qui evaserant possessionem, videri eum armis deiectionem.*

(8) But if, when the owner was entering his possession, armed men who had broken in prevented him from possession, he is held to have been driven out by arms.

The situation described by Ulpian in this text is slightly different from that leading to the trial of Caecina vs Aebutius, because here it is the owner/possessor of the land who is held to have been driven out, whereas in the case of Caecina it was not yet certain whether he as heir to Caesennia had become owner of the land. However, Ulpian does state that using arms to prevent someone from entering is regarded as driving out by arms. This is exactly the point Cicero wanted to make in his plea for Caecina, so it seems that in this respect Cicero was put in the right.

## 6. Comparison

From the above it is clear that Cicero and Ulpian not only interpreted the interdict in the same way, but also applied the same way of reasoning: both used analogy to justify their opinion. There was no explicit norm stating that using armed force to prevent someone from entering a house or piece of land was not allowed. Therefore, they had to assume that there was a hidden norm saying so. But then they were reasoning from probability. For reasoning from logic, it is necessary to have a certain major premises (e.g., 'All men

---

<sup>13</sup> (5) Those who came armed but did not use arms for the driving out, yet did drive out, are held to have done so with armed force. For terrorising by arms is enough to be held as driving out by arms. (6) If someone on the sight of armed men going elsewhere grew so frightened that he fled for fear, he is not held to have been driven out, because the armed men had no such intention but were on the way to somewhere else. (7) And so if on hearing armed men come he abandoned his possession from fear, then, whether he got a true or false impression, he is to be said not to have been driven out by arms, unless possession was first taken over by them.

are mortal'). In this case, like in many legal problems, there is no such certain norm. So, neither of them could apply deductive reasoning.

Of course, Cicero and Ulpian have been involved in legal practice in different ways, as advocate and jurist respectively. An advocate assisted a person who had a legal problem all through the trial: first in getting a proper formula from the praetor and then in giving a speech on behalf of his client before the judge(s).<sup>14</sup> The jurist was the expert who could be asked for advice: not only the client and his advocate could turn to him but also the praetor and the judge.<sup>15</sup> His advice was not binding for the judge, because in each case different jurists could/would give different opinions. The judgements were not published.

However, in two ways publicity could be given to a particular trial: the advocates could publish their speeches and the jurists could publish their opinions. In his *De oratore*, Cicero tells us how Cato and Brutus (2<sup>nd</sup> century BC) published the *responsa* they had given: they used to mention the names of the parties involved.<sup>16</sup> However, he is glad that that custom did not last. Later jurists just mentioned the case and the answer they and/or earlier jurists had given. It would seem that the jurists published their opinions in order to provide a list of precedents for public use because the state did not do so.<sup>17</sup>

The advocates, in their turn, also used to publish their speeches. Obviously, Cicero himself did so, but he was not the only one. In his *Brutus*, he writes that his friend Servius Sulpicius Rufus (whom we now know as jurist) had published three speeches of which he was very proud.<sup>18</sup> When, in 52 BC, Milo stood on trial for the murder of Clodius, M. Brutus wrote and published a plea in his defence although he did not even

---

<sup>14</sup> It is generally taken for granted that the advocates were only active in the second phase of the trial, *apud iudicem*. However, Cicero, *De oratore*, I 166 and 168 show that they were also involved in the first phase, *in iure*.

<sup>15</sup> In the Republic, the dividing lines between advocate, judge, and jurist were very thin. For instance, the jurist P. Mucius Scaevola was judge in the case of Licinnia against the heirs of her late, Gaius Gracchus husband (D. 24.3.66pr.) and Q. Mucius Scaevola was advocate in the *causa Curiana*.

<sup>16</sup> *De oratore*, 2,142. In his letter *Ad Fam* 7.22, Cicero tells Trebatius that he consulted a book with *responsa* by Aelius Catus (consul 198 BC).

<sup>17</sup> However, the jurists seldom mention the name of the judge and the date of the lawsuit – if there had been a lawsuit – so it is not clear whether there was a connection between the opinion of the jurist and the judgment that had been given. An exception to the first rule is Iav. D. 24.3.66pr. (see above, note 14).

<sup>18</sup> Cicero, *Brutus*, 150-157.

deliver it.<sup>19</sup> In his *Institutio oratoria*, Quintilian mentions the publication of his (forensic) speeches; he was an advocate before becoming a famous teacher of rhetoric.<sup>20</sup> Sometimes political speeches were published, like those held by Pliny the Younger in honour of the emperor Trajan.<sup>21</sup>

The purpose of publishing a speech was basically different from that of publishing *responsa*. The one was to serve as an example for students of rhetoric, the other was to facilitate legal practice. But both will have been intended to inspire admiration and to enhance the author's reputation!

More than 30 years ago, Kaser wrote that the jurists were not at all interested in judgments.<sup>22</sup> I would rather say that they were not interested in legal theory. Therefore, there is no reason to qualify the works of the Roman jurists that have come down to us in the Digest as legal science.

---

<sup>19</sup> So Asconius 41 and Quintilian, *Inst. or.* 3.6.93.

<sup>20</sup> Quintilianus, *Institutio oratoria*, ###

<sup>21</sup> Cf. Plinius der Jüngere, *Panegyricus, Lobrede auf den Kaiser Trajan*, Herausgegeben, übersetzt und mit Erläuterungen versehen von Werner Kühn, Darmstadt 1985.

<sup>22</sup> M. Kaser, *Römische Rechtsquellen und angewandte Juristenmethode*. Vienna-Cologne-Graz 1986, 59.